UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/562
2 July 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 562

Case No. 552: AL-JAFF

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Samar Sen; Mr. Hubert Thierry;

Whereas, on 28 March 1990, Mohammed A. Al-Jaff, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 31 May 1990;

Whereas in the pleas of his application, the Applicant requests the Tribunal to:

"...

1. Rescind the decision of the Secretary-General to reject the unanimous recommendation of the Joint Appeals Board ..., namely,

> '(b) that the appellant be retroactively given a contract for one year, from 21 May 1989 to 21 May 1990, for which he had legal expectancy, and that the period from 21 May 1989 to the date upon which he resumes his service, be deemed special leave with pay',

or, in other words, the Secretary-General's decision to terminate the Applicant's appointment;

2. Decide that the Secretary-General's decision to terminate Applicant's appointment, in spite of the unanimous Joint

Appeals Board recommendation, contradicts the assurances repeatedly given by the Under-Secretary-General for Administration and Management on behalf of the Secretary-General... :

> 'just over a year ago, the decision was taken that the Secretary-General would accept all unanimous reports of the Board provided they do not impinge on major questions of law or principles';

...

3. To order the implementation of the Joint Appeals Board's recommendation contained in paragraph 51 (b) of its report and, consequently, the immediate reinstatement of the Applicant as from 21 May 1989;

4. Alternatively, in lieu of specific performance, to order him to pay instead the Applicant as compensation, the sum equivalent to five years base salary."

Whereas the Respondent filed his answer on 14 December 1990;

Whereas the Applicant filed written observations on 13 March 1991;

Whereas on 4 June 1992, the Tribunal put a question to the Respondent and he provided an answer thereto on 10 June 1992;

Whereas on 11 June 1992, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Economic and Social Commission for Western Asia, hereinafter referred to as ESCWA, on 22 May 1984, as a Security Officer at the GS-4, step I level. He was initially offered two successive fixed-term appointments of three and nine months respectively, until 21 May 1985.

In December 1984, the Applicant was suspended with pay, pending the investigation of an incident in which he was accused of attacking another staff member. After reviewing the report of the Committee constituted to investigate the charges, the Chief of Staff Services at Headquarters instructed the Acting Chief, Division of Administration, to lift the suspension because the report did not provide conclusive evidence that the Applicant was guilty of the offence with which he had been charged. The Office of Personnel Services, therefore, could not support, on the basis of the information available, termination of the Applicant's appointment for serious misconduct.

In a memorandum dated 14 March 1985, the Acting Chief of Administration advised the Applicant that he could resume his duties, but also warned him that the Administration would closely observe and evaluate his work performance in order to determine whether he would continue serving ESCWA. The Applicant would be advised of the decision at the appropriate time.

The Applicant's performance during the period 22 May 1984 through 21 May 1985, was rated as "fair". His appointment was then extended for two successive periods of three months and six months, through 21 February 1986. The Applicant's performance during the period 22 May 1985 through 21 May 1986, was rated as "a good performance" and he was then offered a one-year fixed-term appointment through 21 August 1987.

In a performance evaluation report dated 19 February 1987, the Applicant's overall performance during the period 22 May 1986 through 28 February 1987, was rated as "a good performance". However, the Acting Chief, General Services Section, commented that the Applicant "lacks the sense of tact and good judgement in conducting his duties".

The Applicant instituted a rebuttal procedure against the report and the panel constituted to investigate the rebuttal found in his favour. However, in his appraisal of the report, the Executive Secretary upheld the gradings and comments by the First and Second Reporting Officers. The Applicant's appointment was then extended successively for further short-term periods, through 31 December 1987, 31 March, 30 June and 31 December 1988.

In a performance evaluation report dated 11 April 1988, for the period 1 March 1987 through 29 February 1988, the Applicant received 11 "C" (Good) ratings and 2 "D" (Fair) ratings in written and oral English. His overall performance was rated as "Good".

On 2 November 1988, the Applicant wrote to the Acting Chief, General Services Section, asking to be considered for a career appointment, particularly in view of the fact that he would reach the age of 50 on 1 April 1989 and would, therefore, be inelegible for such an appointment after that date. On the same day, the Acting Chief, General Services Section, informed the Applicant that he would be advised of the status of his employment with ESCWA before the expiration of his current appointment on 31 December 1988.

In a letter dated 30 November 1988, the Chief, Personnel Section, informed the Applicant that the Executive Secretary, in accordance with staff rule 109.7, had decided not to extend his fixed-term appointment beyond

31 December 1988 and that he would be considered on special leave with pay with effect from 1 December 1988. According to the record of the case, this decision was based on a recommendation dated 30 November 1988, from the Acting Chief, General Services Section, to the Deputy Chief, Personnel Section, that the Applicant's performance "did not improve ... despite the many opportunities given to him." In his view, the Applicant "did not fulfil the requirement of good tact in dealing with the public" and had not demonstrated "a fair knowledge of the English language when acting as a point of contact on behalf of ESCWA". This communication was never copied to the Applicant.

On 27 December 1988, the Chief, Personnel Section, informed the Applicant that the Executive Secretary had decided, "for humanitarian reasons", to grant him a final three-month extension of his appointment, through 31 March 1989. The Applicant would not work with the Security Section but with the General Services Section.

On 13 February 1989, the Applicant asked the Secretary-General to review, under staff rule 111.2(a), the administrative decision not to extend his fixed-term appointment. On 28 May 1989, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 29 December 1989. Its conclusions and recommendations read as follows:

> "Conclusions and recommendations
>
> 48. The Panel first concludes that the two reasons given for the non-renewal of the appellant's fixed-term appointment were not borne out by the facts, nor properly motivated, and that, therefore, the appellant had a legal expectancy of renewal.
>
> 49. The Panel also concludes that the ESCWA Administration failed to communicate these reasons to the appellant, depriving him of his right to comment thereon, thus denying him due process.
>
> 50. The Panel further concludes that the ESCWA Administration did not make any attempt, notwithstanding its assurances to the contrary, to keep the appellant under contract to allow him to complete five years of service.
>
> 51. Therefore, the Panel recommends:
>
> (a) that the appellant be retroactively awarded a contract for one month and 21 days, from 31 March to

> 21 May 1989, in accordance with the proposal set forth in the memorandum of 5 April 1989 (...) in order to allow him to complete 5 years of service, and that this period during which he was not permitted to work be regarded as special leave with pay; and
>
> (b) that the appellant be retroactively given a contract for one year, from 21 May 1989 to 21 May 1990, for which he had legal expectancy, and that the period from 21 May 1989 to the date upon which he resumes his service, be deemed special leave with pay."

On 5 March 1990, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's report and informed him that:

> "The Secretary-General has re-examined your case in the light of the Board's report and noted that you were exceptionally granted a final three-month extension of your fixed-term appointment for the period 1 January 1989 to 31 March 1989 for humanitarian reasons and that ESCWA notified you accordingly by letter of 30 November 1988. The Secretary-General further recalled that pursuant to staff rules 109.7(a) and 104.12(b) your fixed-term appointment expired automatically on its expiration date of 31 March 1989 and did not carry any expectancy of renewal or of conversion to any other type of appointment, as indicated in your Letters of Appointment, taking also into account your service record at ESCWA.
>
> Notwithstanding the above, the Secretary-General has decided, taking into account the entire circumstances of your case, to grant you retroactively a contract extension for one month and 21 days from 31 March 1989 to 21 May 1989 as special leave with full pay to allow you to complete five years of continuous service for pension purposes, in final settlement of your case, and to take no further action on the matter."

On 31 May 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's discretion not to extend fixed-term appointments may not be exercised when the Respondent gives the staff member a reasonable expectancy of continued employment.

2. The decision not to extend a fixed-term appointment may not be vitiated by improper motive or prejudice.

3. The Secretary-General is obliged to accept the unanimous recommendations of the Joint Appeals Board, since he himself decided, in order to reduce the backlog of cases in the Joint Appeals Board, to implement such recommendations, unless they impinged on major questions of law or principle.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of his fixed-term appointment.

2. The Applicant has not discharged the burden incumbent upon him to prove his allegation that the decision not to renew his fixed-term appointment was vitiated by prejudice and discrimination.

3. The decision to let the Applicant's fixed-term appointment expire was properly motivated.

The Tribunal, having deliberated from 4 June to 2 July 1992, now pronounces the following judgement:

I. The principal facts in this case are not in dispute. Before examining the plea of the Applicant that the Secretary-General's decision "to terminate the Applicant's appointment" on 21 May 1989, be rescinded, the Tribunal has to consider two important issues: first, whether at the time of expiry of the Applicant's fixed-term contract he had any legal expectancy for renewal or extension of that contract; and secondly, whether, and if so to what extent, the unanimous recommendation of the Joint Appeals Board (JAB) was binding on the Secretary-General.

II. As regards the legal expectancy for the renewal or extension of a fixed-term contract, it is common ground that such a contract "having an expiration date specified in the letter of appointment" automatically expires on that day and "does not carry any expectancy of renewal or conversion to any other type of appointment". Nevertheless, the question arises, whether, in this case, and in the light of the decisions taken by the Tribunal in numerous

cases where a legitimate right of extension or renewal has been asserted, the Applicant can be held to have established such a right, on the grounds that a legitimate expectancy of employment was created by the Respondent's actions.

III. The Tribunal has examined each of the grounds given by the JAB in favour of its conclusion that the non-renewal of the Applicant's fixed-term contract was not justified and that the Applicant had a legitimate expectation of renewal. The Tribunal has consistently taken the view that, in deciding the claim for renewal of a fixed-term contract, the totality of all the factors existing at the time should be taken into account as no single element may be decisive. In the present case, the Tribunal finds that there is nothing to substantiate the charge that the decision was motivated by prejudice or other extraneous factors, even though there are hints of different degrees of animosity against the Applicant. The Tribunal finds that, with so many people working together in the difficult conditions of Baghdad, personal likes and dislikes do sometimes develop as they did indeed in this case. They were taken into account by the Respondent but they did not amount to prejudice or bias when the decision not to renew the Applicant's contract was taken.

IV. The JAB concluded that the decision not to renew the Applicant's fixed-term contract was based on an unfavourable report on the Applicant prepared and sent on 30 November 1988, by the Acting Chief of General Services Section. This report reads in part: "the performance of Mr. Al-Jaff did not improve, as was expected recently, despite many opportunities given to him. Also, in performing his duties as a security officer, he did not fulfil the requirements of good tact in dealing with the public and has not shown a fair knowledge of the English language when acting as a point of contact on behalf of ESCWA". He recommended "in consultation with the Chief, Security Office and Safety Unit" that the Applicant's fixed-term appointment be allowed to lapse. The JAB "felt that ... had it not been for these two reasons, renewal would have occurred", and cited several other factors: i.e., that the report was "not borne out by the facts in the file", that the Applicant's performance has generally been good, that the complaint about the Applicant's knowledge of

the English language was irrelevant and finally, that although the Applicant was reportedly involved in several incidents, no action was or could be taken against him after an investigation of the facts. The Tribunal finds that the JAB's conclusion concerning the effect of the report sent by the Acting Chief, General Services Section, is speculative.

V. The JAB also found that the report of the Acting Chief, General Services Section, was not shown to the Applicant as required by administrative instruction ST/AI/292 of 15 July 1982. Although the difficulties relating to his general conduct and behaviour, as mentioned by the Acting Chief, General Services Section, were already known to the Applicant and had been commented upon at different times and on different occasions, in the Tribunal's view, this communication does indeed attract the provisions of ST/AI/292.

VI. The Tribunal has established in its jurisprudence that good performance by a staff member does not by itself create any legitimate expectation for renewal of any fixed-term contract. The General Assembly resolution asking for consideration for continued employment of holders of fixed-term contracts of five years or more is not applicable, as the Applicant had not completed five years of service; furthermore, such consideration does not imply that a staff member has a right to extension.

VII. In the light of these considerations, the Tribunal concludes that, while there was no legitimate expectation of renewal of the Applicant's fixed-term contract, there have been several irregularities and deficiencies surrounding the non-renewal of the contract.

VIII. On the second important issue in this case, namely the extent to which the Respondent is bound by the unanimous recommendations of the JAB, the Tribunal asked the Respondent to furnish the Tribunal with the "pertinent sections of reports of the Secretary-General to the Fifth Committee of the General Assembly, and action taken by the General Assembly, if any, on this question". The Tribunal then considered the Applicant's claim that unanimous

recommendations by the JAB must be implemented by the Respondent except when, in his opinion, they "impinge on major questions of law or principle." A detailed examination of the material sent by the Respondent indicates that, since 1987, the Secretary-General has implemented, in most cases, the unanimous recommendations of the JAB. In the Tribunal's view, the Secretary-General has only adopted a policy, from which he can depart. Thus, the relevant rules concerning the advisory nature of the JAB recommendations remain unchanged. The Tribunal notes the assurance given by the Secretary-General in his report to the General Assembly dated 28 October 1988, that, "Where the recommendation of a Board is rejected, reasons are given for the decision." (A/C.5/43/25).

IX. In this case, the JAB made two recommendations, both favourable to the Applicant - the first one, relating to the awarding of a contract for one month and 21 days in order to ensure that the Applicant was entitled to pension - was accepted. The second one, that "the [Applicant] be retroactively given a contract for one year, from 21 May 1989 to 21 May 1990, for which he had legal expectancy", was rejected. Despite the assurance given by the Respondent in A/C.5/43/25, no reason for this rejection was given.

X. The Tribunal has concluded that the Applicant's claim of legal expectancy has not been established and therefore the decision not to renew his fixed-term contract was in order, especially as no prejudice, bias and other extraneous factors have been found to tarnish the decision. The Tribunal finds also that the Secretary-General was within his rights to reject a part of the JAB recommendation, despite his assurances that he would, in principle, and, as a matter of practice, accept unanimous recommendations made by the JAB.

XI. Nevertheless, the Tribunal finds that in several instances the procedure followed by the Respondent in dealing with the Applicant has been faulty and has caused injury to him. He is therefore entitled to relief and the Tribunal assesses it at US$2,000.

XII. Accordingly, and in view of the above considerations, the Tribunal orders the Respondent to pay the Applicant the sum of US$ 2,000 (two thousand dollars).

XIII. All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Samar SEN
Member

Hubert THIERRY
Member

Geneva, 2 July 1992

R. Maria Vicien-Milburn
Executive Secretary

UNITED
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Administrative Tribunal

Distr.
LIMITED

AT/DEC/563
2 July 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 563

Case No. 595: KHAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas, on 19 March 1991, Shafiuddin Khan, a former staff member of the United Nations, specifically recruited for the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application containing the following pleas:

"II. PLEAS

I hereby request the Administrative Tribunal:

(a) to review my case on the basis of my earlier submissions made to the Director, DOP [Division of Personnel], UNICEF, New York;

(b) to review my responses not considered properly by UNICEF Administration as well as the ad hoc JDC [Joint Disciplinary Committee] because of a biased approach to the whole case;

(c) to rescind the decision of the UNICEF Executive Director terminating my permanent contract which is based on the recommendations of the ad hoc Joint Disciplinary Committee (JDC) of UNICEF;

(d) to consider my reinstatement to the Organization keeping in view my services and very good performance records with UNICEF for more than 27 years."

Whereas the Respondent filed his answer on 20 November 1991;

Whereas the Applicant filed written observations on 27 January 1992, in which he restated his pleas as follows:

"III. PLEAS

...

1. To overrule the decision of the Executive Director of UNICEF to maintain the contested decision;

2. to reject the conclusion and recommendations of the Administration, the Department of Personnel, and the ad hoc Joint Disciplinary Committee to terminate the Applicant's permanent appointment, and to restore the Applicant to the 'Status quo ante';

a. Reinstatement of the Applicant with effect from 8 February 1991,
b. payment of back salaries retroactive from 8 February 1991, to the present, with interest, if reinstated,
c. payment of salaries retroactive from 8 February 1991, to his sixtieth birthday, if (b) above is not adhered to,
d. compensation for accumulated annual leave from 8 February 1991, to end of pay period or age sixty (60) minimum and accumulated leave before and up to date of contested termination compensation for dependency allowance to age sixty (60) for dependent wife and dependent children,
e. compensation for dependency allowance to age sixty (60) for dependent wife and children,
f. compensation for medical, dental and life insurance from date of separation to age sixty (60),
g. compensation for persons assisting the Applicant in preparation of case to United Nations Administrative Tribunal from 8 February 1991 to present.

3. To compensate the Applicant for wrongful termination,

a. a minimum of eight years salary as compensation for the unjust treatment and the suffering that he has endured as well as to cover for damages caused to the Applicant's family,
b. hardships caused to the Applicant and his family,
c. compensation for damage to the Applicant's reputation,
d. to hold oral hearings on the case and invite the Applicant and counsel."

Whereas, on 15 May 1992, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 14 January 1963, as a locally recruited Secretary at the UNICEF Office in Islamabad, Pakistan. At the time of the events that gave rise to the present proceedings he was serving as Administrative, Finance and Personnel Officer at the P-3 level in the UNICEF Office at Addis Ababa (Ethiopia).

In August 1989, the Applicant travelled on home leave to Pakistan for three months. During that period, the UNICEF Representative in Addis Ababa, discovered that the Applicant, in discharging his functions, had not followed a number of guidelines and procedures established by UNICEF in personnel matters. Also, the Staff Association had complained of certain "irregularities and abuses by [the Applicant] which [had] affected the staff morale". At the Resident Representative's request, the Division of Personnel (DOP) at Headquarters arranged for an investigation to be conducted by the Chief, Personnel Section.

In a memorandum dated 3 October 1989, the UNICEF Resident Representative informed the Applicant of the action he had taken and attached a communication prepared by the Chief, Personnel Section, and himself, containing a description of instances in which the Applicant had allegedly abused his authority and for which he was asked to provide explanations. For example, the Applicant was asked why he had granted a series of short-term and fixed-term appointments without following personnel procedures established by UNICEF, as well as clarifications concerning the travel authorization issued for his wife in connection with her evacuation for medical reasons. In a reply dated 6 November 1989, the Applicant set forth his version of the facts.

In a report dated 2 April 1990, an Internal Auditor informed the Deputy Director, DOP, at Headquarters, of the results of his investigation of the Applicant's conduct and recommended that disciplinary measures be taken against the Applicant. On 5 June 1990, the Director, DOP, transmitted to the Applicant a copy of the Internal Auditor's report on his case, adding that: "Having examined [the] report, its findings point to serious financial and

personnel irregularities committed by you in the performance of your functions as Administrative/Finance and Personnel Officer in Addis Ababa. As the officer responsible for safeguarding and properly monitoring the Organization's financial, personnel and administrative functions, we view such irregularities as constituting serious misconduct." The Applicant was asked to provide his comments on the report and was also informed of his right to avail himself of counsel to assist him in the preparation of his reply. In memoranda dated 15 June and 5 July 1990, addressed to the Director, DOP, the Applicant, commenting on the Internal Auditor's report, denied all the charges against him. He also complained that the late transmission of annexes to the Internal Auditor's report had deprived him of the opportunity to make detailed comments thereon in writing. Moreover, he asserted that as he was absent from Addis Ababa when he received the annexes, he was denied the possibility of access to relevant data and to the assistance of a fellow staff member stationed there.

On 8 October 1990, the Director, DOP, informed the Applicant that the Executive Director had decided to charge him with misconduct and to refer his case to an ad hoc Joint Disciplinary Committee (JDC), to be constituted at Headquarters in accordance with UNICEF administrative instruction CF/AI/1990-05 of 17 September 1990, on Revised Disciplinary Measures and Procedures. In the meantime, in accordance with staff rule 110.2, the Applicant was suspended from the Organization with full pay, pending completion of the investigation.

On 8 October 1990, the Officer-in-Charge, Personnel Policy and Services Section, DOP, informed the Chairperson, ad hoc Joint Disciplinary Committee of the sequence of events that had led to the Executive Director's decision to suspend the Applicant, enumerating the charges against him. He submitted a detailed statement of facts, with supporting documentation and stated that "it [was] the position of the Administration that the facts and findings contained [in his communication] reveal, beyond reasonable doubt, that the [Applicant] abused his authority for his personal advantage ... and committed personnel and financial improprieties" during the exercise of his functions as Administrative, Finance and Personnel Officer in Addis Ababa. The ad hoc JDC's advice was accordingly sought on what disciplinary measures, if any, should be taken against the Applicant.

According to the record of the case, the Applicant did not make any further response to the Statement of Charges.

The ad hoc JDC adopted its report on 4 February 1991. Its conclusion and recommendation read as follows:

"Conclusion

The ad hoc JDC makes seven (7) separate statements in its Report with regard to the allegations the Administration makes against Mr. Khan. These points cover personnel issues, financial issues and internal control procedures. Taken individually each of the allegations the ad hoc JDC addresses and comments on are deemed contraventions of UNICEF rules, regulations and procedures of varying severity. However, taken collectively, and viewed as a whole, they depict a systematic abuse of position and authority in all areas for which Mr. Khan was responsible - Administration, Finance and Personnel. The ad hoc JDC therefore feels that in regard to the areas it addresses in its Report the Administration's case against Mr. Khan has validity.

Recommendation

In view of our conclusions, as indicated above, based on due consideration of the allegations by the Administration and of Mr. Shafiuddin Khan's previous responses, we unanimously recommend that Mr. Khan be separated from the Organization without notice or compensation in lieu thereof."

On 8 February 1991, the Executive Director transmitted to the Applicant the ad hoc JDC's report, stating, inter alia:

"...

Having considered all the facts and findings presented in the JDC Report, I have concluded that you abused your authority for your personal advantage/benefit and committed the personnel and financial improprieties noted by the JDC, during your tenure as Administrative/Finance/Personnel Officer in Addis Ababa. The Organization views very seriously such improprieties, as you were, by virtue of your official position, the custodian of all personnel and financial matters.

I have therefore decided to endorse the recommendation of the JDC that you be separated from service as a disciplinary measure under staff rule 110.3(a). However, I have decided that you be paid compensation of three months salary in lieu of notice, as provided in staff rule 109.3.

> The effective date of your separation will be the c.o.b. [close of business] on which you receive this letter. We are requesting, under separate cover, the Islamabad Office to hand deliver this sealed letter to you, and to advise us of the date of its receipt."

On 19 March 1991, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment was motivated by prejudice.

2. The Respondent did not take into account the Applicant's 26 years of untarnished service.

3. The penalty imposed upon the Applicant was unduly harsh and was not commensurate with the offence.

Whereas the Respondent's principal contentions are:

1. The decision to separate the Applicant from the Organization was properly motivated.

2. The proceedings leading to the decision of separation were in compliance with UNICEF Policies, Procedures and Instructions, and fully respected the Applicant's right to due process.

The Tribunal, having deliberated from 15 June to 2 July 1992, now pronounces the following judgement:

I. The Applicant has put forward two sets of pleas: the second set, included in the Applicant's written observations to the Respondent's answer, is more elaborate, but the Tribunal finds that in substance the two sets do not differ much. The principal request of the Applicant is that the Tribunal, after reviewing his case, should order the rescission of the decision of the Executive Director to terminate the Applicant's services with UNICEF and grant financial compensation to the Applicant for injuries he claims to have suffered.

II. In disciplinary cases, the Tribunal's jurisprudence has consistently accepted that the Respondent has broad discretionary authority, provided his

decisions are taken under the prescribed procedure, in accordance with due process and are not tainted by bias, prejudice or other extraneous factors.

III. The Applicant asserts in several places that, in deciding to separate him from UNICEF, the Respondent did not extend to him the protection of the Staff Regulations and Rules and that he was systematically a victim of bias and prejudice. To quote from his written observations, the Applicant states that he "worked tirelessly for ... 26 years without being charged with any improprieties ... until the orchestrated charges were brought against him while he was on home leave from his duty station and could not defend himself."

IV. In view of these allegations, the Tribunal examined the evidence to determine (a) if any irregularities in procedure had been committed and (b) if at any stage or in any manner the conclusions or decisions of the Respondent had been vitiated or influenced by bias, prejudice or other extraneous factors, such as conspiracy.

V. The Applicant went on leave on 18 August 1989, for three months, and on 3 October 1989, the UNICEF Representative in Addis Ababa sent a letter to the Applicant (marked "on return from leave"), asking for his explanations and clarifications on various personnel matters reported to the Representative. The Applicant returned from leave on 28 October 1989, and on 6 November 1989, he sent his reply, containing his explanations and clarifications. The reply given by the Applicant was apparently sent to Headquarters and on 15 February 1990, the Deputy Director, Division of Personnel conveyed to the Officer-in-Charge at Addis Ababa (the UNICEF Representative had left by then) the views of the Division of Personnel on the numerous allegations against the Applicant, together with his replies. The Applicant made no complaint about the procedure followed, though he rejected all charges of wrong-doing and gave his version of what happened in respect of the various incidents brought to his notice in the letter of 3 October 1989. The Applicant added, however, in his reply of 6 November 1989, a postscript which read, "In future may I reiterate that audit/evaluation on the performance of any staff member should be carried out in his/her presence and not absence. In my 26 years with UNICEF it happened for the first time."

The Tribunal finds nothing irregular in these early attempts to discover the facts about the various allegations.

VI. Meanwhile, the Internal Auditors submitted on 2 April 1990, their report on the personnel issues relating to the Applicant's case. The Director, Division of Personnel (DOP), asked the Applicant on 5 June 1990, for his comments and warned him that "we are considering submitting your case to the Joint Disciplinary Committee." The Applicant, in his comments sent on 15 June 1990, said that he was "grateful to you" (the Director, DOP) "for giving me an opportunity to defend against certain allegations made by the Internal Auditor", and he concluded: "Based upon the facts given above, I leave it to you to judge my performance keeping in view my conduct, behaviour and performance...". There is no suggestion, in the view of the Tribunal, that the Applicant was dissatisfied with the procedure followed.

VII. The next stage was reached on 8 October 1990, when the Director, DOP, referred 15 or more charges against the Applicant to the ad hoc Joint Disciplinary Committee with the following concluding words:

> "It is the position of the Administration that the facts and findings contained herein reveal, beyond reasonable doubt, that the Administrative/Finance/Personnel Officer [AFPO] abused his authority for his personal advantage/benefit and committed personnel and financial improprieties during his tenure in Addis Ababa. The Organization views very seriously such improprieties by the AFPO who is, by virtue of his official position, the custodian of all personnel and financial matters. In view of the foregoing and in conformity with staff rule 110.4, the ad hoc JDC is requested to advise the Executive Director as to what disciplinary measures, if any, should be taken in this case."

VIII. At the same time, the Director, DOP, informed the Applicant of his right to submit written observations, to seek advice of counsel, adding:

> "You may suggest other persons of whom inquiry might be made and to request that hearings be held and witnesses called: the ad hoc JDC shall decide if these suggestions or requests are warranted;
>
> To enable you to prepare your response, you may avail yourself of the facilities of the office in Islamabad. Also, you may use any of the communication facilities in the office to

> communicate with [the Coordinator of the Panel of Counsel],if you wish representation by Counsel. In the event you decide to have such representation, we will make available to him/her any relevant documentation on your case.
>
> In accordance with staff rule 110.2, you are suspended with full pay pending the completion of your case."

IX. The Tribunal notes that the Applicant took no action on any of these points and the ad hoc JDC's report stated, inter alia, that "Mr. Shafiuddin Khan has chosen not to respond to the summary of [the] Administration's case" and therefore "in fairness to the staff member", the ad hoc JDC considered the Applicant's submissions to the UNICEF Representative and to the Director, Division of Personnel, "as the basis of his defence to the allegations of the Administration". The Tribunal is not aware of the reasons for the Applicant's attitude towards the ad hoc JDC and notes in this connexion the ad hoc JDC's statement that "some points made by the Administration have not been addressed ... because the ad hoc JDC deemed them either not significant enough or lacking clear relevance to merit further consideration." The Tribunal considers these statements as indicative of the ad hoc JDC's exercise of its own discretion and judgement and of its desire to be as fair to the Applicant as possible in the circumstances. The Tribunal finds that the Applicant was given reasonable time and offered the facilities to which he was entitled to respond before the ad hoc JDC to the accusations against him, but that he decided not to avail himself of them.

X. Taking into account all the measures adopted in examining and deciding the allegations and charges against the Applicant at different stages, the Tribunal concludes that the relevant regulations and rules, as well as the requirements of due process, were correctly observed.

XI. The Applicant has presented a tangled web of innuendos, insinuations and accusations of prejudice and intrigue against the Respondent, and the Tribunal has examined those charges it can identify. In general terms, the Applicant has expressed his grievances (included in his written observations, which the Applicant labels as "responses", filed on 27 January 1992) that the UNICEF Representative drew up his first list of several allegations of wrong-doing on 6 October 1989, when the Applicant was away on leave. The

Tribunal notes that the list was given to the Applicant after his return to Addis Ababa and he replied to it on 6 November 1989. In the circumstances, the Tribunal cannot hold that his absence from Addis Ababa when the UNICEF Representative wrote, but did not deliver, his letter of 6 October, affected the Applicant's interests adversely.

XII. The other general accusation he makes, also in his written observations of 27 January 1992, is that he was "asked to supply information three (3) times to substantiate allegations, knowing full well that the Administration and DOP decided to bring charges against him for improprieties". There is no evidence substantiating this accusation of impropriety.

XIII. The Applicant complains that on the last page of his performance evaluation report for the period 1 January 1989 to 31 December 1989 (his last report before his separation from UNICEF), the comments made on 22 February 1990, by his Second Reporting Officer, "were not made known to the Applicant for his rebuttal". However, the Tribunal notes that the Applicant counter-signed this report on 1 March 1990, and indeed referred to it in his application of 19 March 1990, but had taken no action to rebut or refute such adverse comments as he found in it.

XIV. In his explanation and clarification of 6 November 1989, the Applicant stated, inter alia, "I am a little perturbed that an audit/evaluation of my performance was carried out by [the Chief, Personnel Section] in my absence", but a little later he added: "I fully revere the competence and knowledge of [the Chief, Personnel Section] in personnel matters and regard him as my teacher". In the circumstances, the Tribunal cannot find that the Chief, Personnel Section's enquiry into the complaints against the Applicant was in any way biased.

XV. Finally, the Applicant complains that he did not have any opportunity to challenge the composition of the ad hoc JDC. Apart from there being no provision for such a challenge, the Tribunal considers that he could nonetheless have conveyed his objection to the Personnel Department if he wished to, but he did not do so.

XVI. Besides these complaints, which the Applicant tends to believe prove bias or prejudice or conspiracy, in his application, the Applicant also expresses a suspicion concerning a Personnel Officer who might have nursed a grudge against him for some incident that took place nearly 10 years ago. The Tribunal cannot but reject such a far-fetched speculation and will not therefore entertain the Applicant's request for any document relative to this suspicion. Similarly, his complaint that no reference has been made to the "Statement of [the Applicant] on petty cash transactions", prepared by a staff member of UNICEF at Addis Ababa in 1990, has, in the opinion of the Tribunal, no substance. In any event, this statement was available to reviewing authorities which dealt with this case at different times and stages.

The only indication of personal friction the Tribunal can trace in this voluminous case relates to some unpleasant altercation between the Applicant and the Internal Auditor. However, neither one nor the other allowed this exchange to get in the way of his work, and the Tribunal finds nothing in the Internal Auditor's report of 2 April 1990, that could be considered as arising from spite or a grudge. In any event, this report, as all the others, was subjected to repeated scrutiny by the Department of Personnel, the ad hoc JDC and finally by the Executive Director.

XVII. As a result of its examination, the Tribunal is satisfied that the decision of the Respondent to separate the Applicant from the service of UNICEF was not tainted in any manner.

XVIII. On the merits of the findings of the ad hoc JDC and of the Respondent's decision thereon, the Applicant makes a number of points. After maintaining his claims of complete innocence of all the charges, the Applicant says that his long and valuable service with UNICEF, totally untarnished and often appreciated, was not taken into account by the various investigating authorities. The Tribunal finds, on the other hand, that both the Director, DOP, and the Executive Director carefully reviewed the case, especially the Applicant's memoranda of June and July 1989, containing his version of the events and his comments, before deciding on the Applicant's termination. The other bodies dealing with the case had also carefully examined the specific charges. The Tribunal notes that a past record of good service may become

irrelevant if specific charges of wrong-doing are proved. At any rate, these charges involving massive documentation and much detail, were, the Tribunal concludes, fully and correctly investigated. The Tribunal would, following its jurisprudence, not substitute its own judgement for the findings of the ad hoc JDC or for the decision of the Respondent in the absence of any flawed procedure, lack of due process, the existence of prejudice or of other extraneous factors.

XIX. The ad hoc JDC made seven statements, all pointing to the culpability of the Applicant, and concluded that, taken together, they constituted sufficient ground for recommending separation of the Applicant from UNICEF. The Tribunal does not find any irregularity or inconsistency in that.

XX. The Applicant also contends that the severity of the punishment - separation - is not justified, that the principle of first offence has not been applied and that in many respects the Declaration of Human Rights has not been observed. The Tribunal has already indicated the broad discretionary power of the Respondent in disciplinary cases, which it finds to have been properly exercised in this case.

XXI. The Tribunal, therefore rejects the application.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Ioan Voicu
Member

Geneva, 2 July 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/564
2 July 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 564

Cases No. 520: LAVALLE
No. 580: LAVALLE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu; Mr. Hubert Thierry;

Case No. 520

Whereas, on 19 March 1991, Roberto Lavalle, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application which did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 12 August 1991, the Applicant, after making the necessary changes, again filed an application, in which he requested, in accordance with article 12 of the Statute of the Tribunal, the correction of alleged errors in Judgement No. 501, rendered by the Tribunal on 9 November 1990;

Whereas the application contained pleas which read, in part, as follows:

"II. Pleas

2. Applicant respectfully requests the Tribunal to correct Judgement No. 501 ..., so as to correct the factual errors detailed below ...

3. The judgement ... contains a number of purely factual errors serious enough to warrant correction under the last sentence of article 12 of the Statute of the Tribunal.

4. The most serious of these errors are in para. X of the operative part of the judgement...

5. ... the word 'finds' [in paragraph X] should be changed to 'notes'. The 'performance report' that is the subject of the first sentence of para. X does not exist. And, contrary to what the sentence affirms, there has never been, nor has Applicant ever claimed that there has been, a 'gap' of any kind in any of the reports prepared on his performance. Unlike the performance report that is the subject of the first sentence of para. X, the one with which the second sentence of the paragraph deals does exist (but was not in Applicant's official status file at the time of the decision he contested in case No. 520). However, contrary to what the second sentence avers, there has never been any question whatsoever 'concerning the authority of the Officers signing' that or any other report on Applicant's performance. Actually the 'questions' to which the second sentence (wherein the word "reports" should have been in the singular) refers relate to the period mentioned in the first sentence, for which period, as Applicant has noted, no performance report was ever prepared. ... The 'gap and uncertainty' that are the subject of the third sentence of para. X concern only the period to which the first sentence refers. The 'gap' in question, however, is not one in a performance report, but a gap in Applicant's performance record for the whole of that period, the reason for this gap being the 'actions' referred to in the third sentence.

...

7. Para. XI of the judgement misquotes the Joint Appeals Board report ... In ... para. 33 ... the Board did not say that 'it was incumbent upon the Administration to make every effort in completing the Performance Evaluation Report' (emphasis added). What the Board said is that 'it was incumbent upon the Administration to make every effort in completing the performance evaluation record' (emphasis added). ...

8. ... On page 4 of the judgement it is stated that '[o]n 27 June 1986, the Applicant asked the Secretary-General to review the administrative decision to abolish his post' (emphasis added). Applicant did not ... make any such request. What Applicant asked the Secretary-General to review was the decision to terminate his appointment...".

Whereas, on 21 August 1991, the Respondent filed his answer, in which he stated:

> "Respondent notes that Applicant does not request revision of Judgement No. 501, but only correction of a few clerical errors of no significance to the outcome of the case and submits that:
>
> (a) Applicant is correct in stating that no PER [Performance Evaluation Report] exists for the period January 1983 to September 1984. He is also correct in stating that the reason for no PER existing is given in the third sentence of para. X of Judgement No. 501, namely, that no officials of UNEP familiar with Applicant's work were found in order to sign the required report (...).
>
> (b) Applicant is not absolutely correct in asserting that the second sentence of para. X of Judgement 501 is mistaken 'as there has never been any question whatsoever concerning the authority of the Officers signing that or any other report on Applicant's performance' (...). Para. 34 of the JAB report states that: '... In fact the PER for the period 1980-1983 was only completed in May 1985, which casts doubt on its validity and objectivity as both the First and Second Reporting Officers may not have been able to recall fully the performance of the staff member during that period, and, moreover, may not have been able to evaluate the staff member without being influenced by his performance at the time of the completion of that PER...'.(emphasis added, ...). ... and
>
> (c) Applicant is correct in stating that para. 33 of the JAB report refers to his 'performance evaluation record' and not his 'Performance Evaluation Report' (see para. XI of Judgement No. 501). He is also correct that on 27 June 1986, he requested a review of the decision to 'terminate his appointment' (...) and not 'to abolish his post' (emphasis added, see Judgement No. 501, page 4)."

Whereas the Applicant filed written observations on 11 September 1991;

Whereas, at the request of the Tribunal, the Applicant submitted an additional statement on 7 January 1992;

Whereas the facts in the case are set out in Judgement No. 501;

Case No. 580

Whereas, on 14 February 1991, the Applicant filed an application containing the following pleas:

"II. Pleas

4. Applicant respectfully requests the Tribunal to order the rescission of the decision contested and fix the compensation due to him, whether or not Respondent decides that he is to be compensated without further action being taken, at three months net base salary."

Whereas the Respondent filed his answer on 7 March 1991;

Whereas the Applicant filed written observations on 22 March 1991;

Whereas the facts in case No. 580 are as follows:

In addition to the facts recited in Judgement No. 501, the following facts are relevant.

In a memorandum dated 10 March 1986, the Applicant stated his intention to institute a rebuttal against his performance evaluation report covering the period from 1 July 1980 to 14 February 1983, in accordance with ST/AI/240/Rev.2. The Applicant submitted his statement of rebuttal on 31 March 1986. On 21 May 1986, the Applicant separated from the service of UNEP.

The Executive Director, in his appraisal, prepared in accordance with ST/AI/240/Rev.2, endorsed the findings of the panel constituted to consider the Applicant's rebuttal and recommended a number of changes to the report, while maintaining the ratings.

On 1 August 1989, the Applicant asked the Secretary-General to withdraw from his personnel file the performance evaluation report evaluating his services from 1 July 1980 to 14 February 1983, together with all documents concerning the rebuttal proceedings he had instituted. He also asked for payment of six months' net base salary as compensation for the "harm done to [his] professional reputation by the report". In a letter dated 17 October 1989, the Assistant Secretary-General for Human Resources Management (OHRM) rejected the Applicant's requests. On 1 November 1989, the Applicant asked the Secretary-General to review that administrative decision.

In a reply dated 13 December 1989, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to maintain the decision. On 27 December 1989, the Applicant lodged an appeal with the Vienna Joint Appeals Board (JAB). The JAB adopted its report on 1 November 1990. Its conclusions read, in part, as follows:

"E. Conclusions of the Panel

...

2. Merits of the appeal

(a) Lack of seriousness and carelessness in its preparation

In the opinion of the Panel, the appellant fails to prove his charges. Spelling and syntax errors, while certainly not commendable, are no sufficient proof of carelessness concerning the content of the report.

(b) Staleness of the report

The Panel notes that, in fact, the PER [Performance Evaluation Report] for the period in question, 1 July 1980 - 14 February 1983, was prepared with considerable delay, having been signed by the appellant's supervisors on 25 May 1985. Furthermore, the Panel notes a delay of nearly ten months between this date and that on which the appellant signed the PER, namely, 7 march 1986. The Panel, however, while not justifying these delays, cannot but observe that the preparation of the report was initiated early in 1985 at the request of the appellant, who, having noticed its absence from his file, considered that this fact could have negative consequences for his career.

... It is not until 3 June 1986, in a fourth submission made by the appellant in relation to his rebuttal, that 'staleness' of the report is mentioned as a ground for its invalidation. Consequently, the Panel cannot avoid the impression that the argument of staleness was a reaction of the appellant to the contents of the report, and not to its lateness.

...

(c) Lack of impartiality of the Executive Director and of the UNEP officials making up the Panel

The appellant claims that his attempt to have the decision to abolish his post rescinded earned him the enmity

> of the above-mentioned persons. The Panel feels, however, that the appellant fails to provide any proof that the alleged hostility and a resultant loss of objectivity actually obtained. The constitution of the Panel that reviewed his rebuttal of the PER was accomplished in accordance with ST/AI/240/Rev.2. Thus, the appellant exercised his right to select a panel acceptable to him, and proceeded to submit his case to it. The appellant cannot, in the opinion of the Panel, question, years later, the objectivity of the members of the rebuttal Panel without providing sufficient proof.
>
> Furthermore, after careful examination of ST/AI/240/Rev.2 and of UNV/INF/173, the Panel finds no grounds on which a performance evaluation report that has gone through a rule-conform rebuttal could be eliminated from a staff member's official status file.
>
> Finally, the information available to the Panel of the appellant's employment record after termination of his appointment with UNEP does not support his contention that he has been harmed by the presence of the PER in question in his official status file.
>
> ...
>
> Consequently, the Panel finds itself unable to recommend that either claim made by the appellant, i.e., that the PER in question be removed from his file and that he be paid six months' salary as compensation for the damage caused, be granted."

On 18 December 1990, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to maintain the contested decision.

On 14 February 1991, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The performance evaluation report does not meet minimum formal standards of seriousness, which connotes extreme carelessness in its preparation;

2. Having been prepared over two years after its cut-off date, the report is stale;

3. The meeting between the First Reporting Officer and the Applicant called for by paragraph 11 of ST/AI/240 was never held.

Whereas the Respondent's principal contention is:

Appraisal of a staff member's performance is a discretionary decision of the Secretary-General reviewable only if motivated by prejudice. The Applicant alleges only error of form and delay. However, the Applicant has already been awarded adequate compensation by the Tribunal for these defects and delay surrounding the finalization of his Performance Evaluation Report.

The Tribunal, having deliberated from 16 June to 2 July 1992, now pronounces the following judgement:

I. As the applications in cases No. 580 and No. 520 both follow Judgement No. 501 and are linked, the Tribunal orders their joinder.

II. The application in case No. 580 raises two distinct questions:

(1) Should the report evaluating the Applicant's services from 1 July 1980 to 14 February 1983, be removed from his personnel file?

(2) Should the Applicant be awarded compensation for the injury which the report has caused him?

III. Regarding the first, the Tribunal decided in its Judgement No. 501, that: "Also, there was doubt on the accuracy of the performance report evaluating the Applicant's services during the period running from 1 July 1980 to 14 February 1983, due to questions concerning the authority of the officers signing the reports".

Because of that doubt, which, however, is not equivalent to a finding that the report is erroneous and hence, does not warrant ordering that the report be withdrawn from Applicant's personnel file, the Tribunal considers that it is proper that the present judgement be placed in that file, together with Judgement No. 501.

IV. Regarding the second question, the Tribunal notes that the Applicant has already been compensated by Judgement No. 501 for the alleged injury.

Indeed, it is because of the irregularities in the evaluation of his services that the Applicant has been awarded compensation amounting to three months of his net salary. Allocation by the Tribunal of a new indemnity would therefore lack any legal basis.

V. The Tribunal orders that the present judgement be placed in the Applicant's personnel file, together with Judgement No. 501.

VI. The Tribunal rejects all other pleas.

VII. The application in case No. 520 seeks various corrections in the text of Judgement No. 501, dated 9 November 1990, rendered on a previous application concerning the termination of the Applicant's services. The new application is based on article 12 of the Statute of the Tribunal, which states in fine: "Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties". In the consideration of this case, the Tribunal deems it necessary to make certain comments on these provisions.

1. Unlike an application for the revision of a judgement, also under article 12 of the Statute, based on the discovery of a new fact, an application for the correction of a judgement may be made "at any time" and is thus not subject to time-limits.

2. Upon receiving an application for the correction of a judgement, the Tribunal may correct "clerical or arithmetical mistakes ... or errors arising ... from any accidental slip or omission". The terms used in article 12 of the Statute must be interpreted strictly, because article 11 of the Statute gives the person in whose case a judgement has been rendered, the right to contest it, by applying to the Committee established by paragraph 4 of article 11, on the following grounds: that the Tribunal "has exceeded its jurisdiction or competence or ... has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice". Any confusion between the remedy provided in article 11 and an application under article 12 for the

correction of a judgement must be scrupulously avoided. Hence, all requests for changes in wording which go beyond those authorized by the language used in article 12 for correcting a judgement must be rejected.

3. The right conferred on the parties by article 12 in fine is not intended to open the door to corrections irrespective of whether either party may have any interest in them. The principle expressed by the maxim "Pas d'intérêt, pas d'action" is as applicable to appeals made to the Administrative Tribunal of the United Nations as to any other court. Thus, in principle, only if a clerical or arithmetical mistake or an error arising from any accidental slip or omission affects the Applicant's rights under a judgement, would the Tribunal ordinarily be constrained to grant an application for correction.

VIII. In the present case, there may be some doubt about the Applicant's interest in the correction of the wording in several parts of Judgement No. 501, which awarded him compensation equivalent to three months' net salary because of irregularities in the assessment of his performance from 1980 to 1984. Nevertheless, in the interest of the proper functioning of administrative justice, the Tribunal will take account of the Applicant's requests, insofar as the corrections he seeks are compatible with the terms of article 12 of the Statute.

IX. The Applicant points out that on page 4 of judgement No. 501 (i.e. in the recital of the facts), it is stated that the request made by him to the Secretary-General was in respect of the decision "to abolish his post", whereas it related to the decision to terminate his appointment. That is a clerical error which ought to be corrected.

X. The Applicant points out that the language of paragraph X of Judgement No. 501, which concerns the lacunae found in the assessment of his performance, is not totally accurate. No report having been prepared for the period 1983-1984, it would have been more accurate to refer in the first sentence of the paragraph to the Applicant's "performance record", rather than to his "performance report". The same applies to paragraph XI of the judgement,

while the word "reports" in the second sentence of paragraph X ought to be in the singular, not in the plural. The Tribunal considers that these errors are accidental and ought to be corrected.

XI. The Applicant asks, finally, that the wording of paragraph X be substantially modified on the grounds that incorrect reasons were cited by the Tribunal for doubting the accuracy of the assessment of his performance. On this point, the Applicant's request, which is opposed by the Respondent, goes beyond the criteria for the correction of a judgement stated above. The Tribunal therefore denies this request.

XII. Accordingly, the Tribunal decides:

1. To replace the words "to abolish his post" in page 4 of Judgement No. 501 by the words "to terminate his appointment".

2. To replace the word "report" in the first sentence of paragraph X by the word "record" and to proceed likewise in paragraph XI where the word "reports" is replaced with the word "record" and the words "Performance Evaluation Report" by the words "performance evaluation record".

3. To delete the letter "s" from the word "reports" in the penultimate sentence of paragraph X.

4. To reject all other requests.

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Hubert THIERRY
Member

Geneva, 2 July 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/565
2 July 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 565

Case No. 612: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Samar Sen;

Whereas at the request of Mohammed Ali Al-Atraqchi, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 15 July 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 9 July 1991, the Applicant filed an application containing the following pleas:

"II. PLEAS

The Tribunal is respectfully requested:

1. To find that the Secretary-General has failed to suspend staff rule 104.14 (which governs promotions) as required by staff regulation 12.3, and that, therefore, the Vacancy Management and Redeployment System, introduced by ST/AI/338 and its addenda, is illegal.

2. To find that the discretionary power of the Secretary-General to promote staff members is not absolute as claimed by the Respondent during the JAB [Joint Appeals Board] proceedings.

3. To find that Applicant did not receive the fullest consideration with regard to his candidacy for the post D-1, Chief Security Council and Political Committees Division, Department of Political and Security Council Affairs, No. 90-P-PSC-251-NY, as per this Tribunal's judgements No. 362 (Williamson) and No. 447 (Abbas).

4. To find that the JAB failed to fully investigate his appeal, and for instance, did not mention at all the affidavit signed by nine staff members, which was mentioned in paragraph ... of the earlier JAB report on his case (...) with reference to the issue of prejudice against him and of favouritism towards Mr. Nicolae Ion.

5. To find that the Secretary-General's refusal to investigate, as unanimously requested by the JAB in paragraph ... of the JAB report ..., the contention that it was widely known that Mr. Nicolae Ion would get the contested D-1 post even before he was promoted, proves that the selection process was vitiated from the beginning.

6. To find, if anything, that the issue of prejudice against Applicant has become more serious since his earliest JAB report.

7. To conclude that the selection process which awarded Mr. [James] Ngobi a promotion to D-1 was, therefore, null and void.

8. To conclude that Applicant was the most qualified of all candidates for this D-1 post.

9. And consequently, to order:

(a) Respondent to promote Applicant to the D-1 level, retroactively to the date when Mr. Ngobi was promoted to D-1.

(b) Retroactive wages and benefits at the D-1 level less wages and benefits received at the P-5 level from no later than the date of confirmation of the promotion which was denied to Applicant.

(c) Respondent to grant Applicant, in case this Tribunal does not wish to order specific performance, damages equal to two years net base salary.

(d) Additional damages for the continuous hindrance to the development of Applicant's career."

Whereas the Respondent filed his answer on 3 December 1991;

Whereas the Applicant filed written observations on 14 February 1992;

Whereas, on 28 May 1992, the Applicant submitted an additional statement and produced additional documents and on 5 June 1992, the Respondent provided his comments thereon;

Whereas, on 11 June 1992, the Applicant requested the Tribunal to postpone its consideration of the present case until the Respondent conducted an investigation recently decided upon, related to Judgement No. 538 and on 25 June 1992, the Tribunal rejected the Applicant's request;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level as an Associate Statistician with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent appointment and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs, as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer.

On 16 April 1990, the Administration announced in Internal Vacancy Announcement 90-P-PSC-251-NY the vacancy of the D-1 post of Chief of the Security Council and Political Committees Division, in the Department of Political and Security Council Affairs. Staff members at level D-1 or P-5 were eligible to apply. The Applicant and other staff members applied for the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment system established under Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date (and its addenda).

According to this administrative instruction, the system was designed to fill through redeployment essential posts that were vacant as a result of the recruitment freeze or projected to become vacant in the near future, but it was only the first step towards establishing a more rational human resources management system and towards a more comprehensive procedure that would involve a thorough review of all posts in the context of measures being taken to streamline and rationalize the Organization. Under the new system, all posts vacant or expected to become vacant would be reviewed by departments

and offices to determine which posts were essential in order to meet programme mandates; all vacancies to be filled would be advertised and qualified staff members would be invited to apply, including those serving within the office where the vacancy was located; the candidates would be reviewed and evaluated by a Redeployment Committee - whose functions would be initially entrusted to the Appointment and Promotion Board at Headquarters for posts in the Professional category and above - which would recommend a short list of staff members determined to be the best qualified for each vacancy; and the short list of candidates would be communicated to the heads of department or office concerned, who would then make the final selection. However, as the 1986 promotion review was already under way, vacant posts already identified for staff members recommended for promotion would not be included in the review described above.

All applications for the post of Chief of the Security Council and Political Committees Division were accordingly forwarded to the Appointment and Promotion Board which, at its 1590th meeting held on 26 July 1990, short-listed, in alphabetical order, six candidates, including the Applicant, and decided that their names should be transmitted to the Department for final selection. On 20 August 1990, the Office of Human Resources Management informed the Applicant that, after careful evaluation of his application for the vacancy, he had not been selected for the post.

On 11 September 1990, the Applicant requested the Secretary-General to review the administrative decision of 20 August 1990, stating, inter alia, that his academic background, work experience in the Department and seniority were superior to those of the staff member selected for the post and that the decision not to promote him to the D-1 level against the post in question was contrary to staff regulations 4.2 and 4.4. In a reply dated 21 September 1990, the Chief of the Administrative Review Unit, Office of Human Resources Management, informed the Applicant that the review he had requested would be conducted, and if he received no answer to this letter within a month, he could file his appeal with the Joint Appeals Board.

On 5 November 1990, having received no further reply from the Secretary-General, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 26 April 1991. Its considerations and recommendations read as follows:

"Considerations

8. The Panel first considered Appellant's contentions - and Respondent's counter-arguments - with respect to staff rule 104.14(f)(iii)(a) and the suspension of the annual promotion review. The Panel could find no evidence that the Secretary-General had, in conformity with staff regulation 12.3, proposed to the General Assembly a change in the text of the rule which would have the effect of suspending or eliminating the annual promotion review. Moreover, after studying the text of GA Resolution 44/185, the Panel found no merit in Respondent's contention that that resolution '... appears to have disposed of the issue.' Operative paragraph 7 of the Resolution 44/185A does recognize the positive elements in the vacancy management programme, but operative paragraph 8(a) leaves for the General Assembly at its 45th session 'the review of rules, regulations and criteria for the promotion of staff.' The Panel believes that the implementation of these two paragraphs should not adversely affect the orderly procedure of the annual review.

9. The Panel concluded, therefore, that Appellant was correct in asserting that staff rule 104.14(f)(iii)(a) is still in force and that the Secretary-General has failed to observe its provisions and, consequently, the Applicant's terms of appointment.

10. The Panel was, however, of the view that the Appellant had been given full and fair consideration within the context of the vacancy management review. The fact that his name had been included in the short list approved by the Appointment and Promotion Board was in itself a sufficient indication. Since the candidate selected ultimately by the Department for the post was on the short list that was approved and duly submitted by the Appointment and Promotion Board for such selection and since the short list was not presented to the Department in an order of priority, the Panel could not find any evidence of prejudice against the Appellant.

11. It then considered whether and how Appellant should be indemnified, and came to the conclusion that there was no award to Appellant it could justly recommend. The Panel agreed that the Appellant had been injured, but the injury was not greater than that suffered by the vast majority of staff members who had also been denied the annual promotion review. While the Appellant was entitled to an annual review under staff rule 104.14(f)(iii)(a), he has not demonstrated that he would have been actually promoted had that review taken place. Since the absence of that annual review was not deliberately and uniquely imposed in his case, but rather was

suffered equally by all staff members who were similarly entitled to such a review, the Panel was unable to recommend any indemnity that would be limited solely to the Appellant. Any remedy to be instituted to rectify the problem should, therefore, apply equally to all affected staff members.

Recommendations

12. The Panel unanimously recommends that, unless and until the General Assembly formally adopts changes in the text of staff rule 104.14(f)(iii)(a), the annual promotion procedure specified therein should be followed.

13. The Panel makes no further recommendation in support of the appeal."

On 6 May 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General had decided to maintain the contested decision and take no further action in the case. The letter read in part as follows:

"The Secretary-General, has re-examined your case in the light of the Board's report which made no recommendation in support of your appeal. He has taken note of the general recommendation made by the Board in paragraph 12 of its report.

The Secretary-General has decided to maintain the contested decision and that no further action be taken in your case. His decision is based on the Board's conclusion that you were given full and fair consideration for the post in question under the vacancy management system. The Secretary-General does not share, however, the reasoning of the Board in paragraphs 9 and 11 of the report which denies the validity of the vacancy management system. The Secretary-General promulgated the vacancy management system in Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 which, while it remains in effect, has suspended the application of the procedure provided for in staff rule 104.14(f)(iii)(a), a promotion review to be conducted normally once a year. The establishment of the vacancy management system constituted a valid exercise of the Secretary-General's authority as Chief Administrative Officer."

On 9 July 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General has failed to suspend staff rule 104.14, as required by staff regulation 12.3.

2. The discretionary power of the Secretary-General to promote staff members is not absolute.

3. The Applicant's candidature did not receive the fullest consideration.

4. The JAB did not conduct a fair and objective review of the Applicant's case, as required by staff rule 112.2(m).

5. The failure of the Secretary-General to investigate the affidavit signed by nine staff members stating that it was widely known that Mr. Nicolae Ion would receive a promotion to D-1 even before he was officially selected proves that the selection process was vitiated ab initio.

Whereas the Respondent's principal contentions are:

1. The introduction and subsequent implementation of the Vacancy Management and Staff Redeployment System (VMS) was a valid exercise of the Secretary-General's responsibilities as chief administrative officer of the Organization. VMS meets the requirements of a fair and reasonable promotion procedure.

2. The Applicant's claims that his rights were violated by the Respondent's failure to investigate charges made in a prior appeal are res judicata.

The Tribunal, having deliberated from 5 June to 2 July 1992, now pronounces the following judgement:

I. The Applicant challenges the decision conveyed to him on 6 September 1990, in which the Secretary-General decided not to select him for the post of Chief, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA), for which he had applied. This vacancy was filled following the procedure established by the Vacancy Management and Redeployment System (VMS). In the course of this procedure, the Applicant's application was reviewed by the Appointment and Promotion

Board (APB) and his name was placed on the short-list submitted to the Under-Secretary-General, PSCA, who finally selected another candidate from the short-list.

II. The Applicant, in his recourse, challenges the validity and applicability of the VMS and then goes on to claim that even if the VMS were to be considered valid, the contested decision would nevertheless be void, since he did not receive the fullest consideration during the selection process. Also, this process is viewed by the Applicant as tainted by prejudice as a consequence of the reluctance of the Administration to investigate his claim that, in a previous instance, a promotion he sought was virtually decided upon before the review of the candidates took place.

III. As far as the validity and applicability of the VMS is concerned, the Tribunal reiterates the conclusion reached in Judgement No. 537, Upadhya (1991), that the VMS was validly established. It is, therefore, applicable in the present case.

IV. The Applicant also claims that, even under the VMS, the outcome of the selection process is not valid because his application was not given the fullest consideration. In support of his claim, he relies on Judgement No. 447, Abbas (1989), where, in paragraph VII, the Tribunal held that "the burden of proof of having given consideration is on the Respondent, whenever a staff member questions that such consideration was given". On this basis, the Applicant contends that the Respondent has failed to produce evidence to prove that his application was duly considered during the selection process.

V. The Tribunal is unable to share this view for the following reasons. The VMS selection process, according to ST/AI/338, is conducted in two steps: the applications are first considered by the APB and a short-list is drawn up and submitted to the head of the department concerned; then, the head of the department makes his choice. As far as the first step is concerned, detailed guidelines, to be followed by the APB, are set forth in Chapter II of ST/AI/338. Once the APB concludes its review, the decision rests with the

head of the department. For this second phase, there are no guidelines. Under Chapter III of ST/AI/338, the head of the department concerned is free to choose any short-listed candidate he judges to be best qualified for the job.

VI. In the case of the Applicant, no evidence was or had to be submitted by the Administration to prove that the guidelines of Chapter II of ST/AI/338 had been followed. Since the Applicant's name was included in the short-list, his candidacy had been duly considered.

VII. As the Joint Appeals Board found, there was no evidence of any impropriety on the part of the head of the department in selecting someone other than the Applicant for the post. Since the selection is a matter entirely within the discretion of the head of the department, the Applicant's contentions are not sustainable in the absence of proof of abuse of discretion. No such proof exists in this case. Moreover, as the Tribunal noted in Judgement No. 538, Al-Atraqchi (1991), paragraph VII, it will not examine the Applicant's claim that his merits are superior to those of the candidate selected. The head of the department is free to make his own assessment.

VIII. For the foregoing reasons the Applicant's claims that he was not duly considered for promotion must be rejected.

IX. The Applicant also claims that the selection process was tainted because in another case of promotion in which he and others were involved, he produced evidence that the post he applied for was already earmarked for another staff member before the review by the APB and that no investigation of this issue had been carried out. The Tribunal is of the view that, even if the Applicant's allegations were proved correct, this would in no way affect the decision taken in this case. The alleged existence of prejudice against the Applicant and others in a different case is not sufficient to prove that the Applicant was subjected to prejudice in the present case.

X. For the above-mentioned reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Samar SEN
Member

Geneva, 2 July 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/566
2 July 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 566

Case No. 602: AHMED

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Ioan Voicu;

Whereas, on 4 June 1991, Anis Uddin Ahmed, a former staff member of the United Nations, filed an application containing the following pleas:

"Section II. PLEAS

(...)

(a) The Applicant is requesting the Tribunal to order the production of the following documents:

(i) Copy of the Vacancy Announcement 89-A-OPB-347-NY.

(ii) Statements of qualifications and experience of the candidates short listed by the APB [Appointment and Promotion Board] for the post of Chief, MAS [Management Advisory Service].

(iii) Fact-sheet of the Applicant.

(iv) Copy of a letter from [the Assistant Secretary-General, Office of Human Resources Management] to [the Acting Under-Secretary-General, Administration and Management], which is referred to in the letter attached (...).

(b) The Applicant is contesting the following decisions:

(i) The decision of the Secretary-General to fill the vacancy under the vacancy management procedure, instead of under the procedure laid down in staff rule 104.14(f)(iii) which was not yet superseded.

(ii) The decision by the APB not to prepare a short list of the 'best qualified' candidate(s) for the post, as required under the VMS [Vacancy Management and Staff Redeployment system] procedure as laid down in ST/AI/338/Add.5, para. 10 (...).

(iii) The decision of the APB not to recognize the Applicant as the 'best qualified' of all candidates, which was an objective fact.

(iv) The decision of the APB not to take into account the implications of the phrase 'other things being equal' in (...). Had it done so the invoking of the secondary criterion, that is to say, whether a candidate's post was slated for abolition, would not be necessary.

(v) The decision by the Secretary-General (in OHRM [Office of Human Resources Management]) not to point out to the APB the violation of the required procedure, which was his duty.

(vi) Consequent decision by the Secretary-General to appoint Mr. J. Klee instead of the Applicant as the Chief, MAS (...).

(vii) The decision of the Joint Appeals Board [JAB] or its failure to consider the issues stated in my observations on the Respondent's reply, particularly the issues C, D and E described in ... .

(viii) The conclusion of JAB that 'though the VMS seems to be at variance with staff rule 104.14, the panel had no basis for concluding that the appellant would have been promoted against the contested D-1 post, if staff rule 104.14(f)(iii) had been adhered to.' (...)

(ix) The conclusion of JAB that 'the appellant's right to full and fair consideration for the contested post was honoured'. (...)

(x) The amount of compensation. It should have been higher.

(c) Adequate compensation in lieu of rescission of the decision mentioned in (vi) above.

(d) The amount that would have been added to the Applicant's emoluments and pension from the time the post of Chief, MAS, was filled plus adequate compensation for injustice suffered by the Applicant."

Whereas the Respondent filed his answer on 14 November 1991;

Whereas the Applicant filed written observations on 11 March 1992;

Whereas, on 5 June 1992, the Tribunal asked the Respondent to produce documents requested by the Applicant, and on the same date, the Respondent complied with the Tribunal's request;

Whereas, on 23 June 1992, the Applicant submitted his comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 20 January 1970. He was initially offered a one-year intermediate-term project personnel appointment, under the 200 Series of the Staff Rules, at the L-4 level, as an Expert in Development Administration in the Office of Technical Cooperation at the Institute of Public Administration in Khartoum, Sudan. His appointment was extended for further fixed-term periods until 1 January 1973, when he was transferred to Headquarters as a Consultant at the P-4 level, on a nine-month fixed-term appointment under the 100 Series of the Staff Rules, in the Administrative Management Service of the Office of the Under-Secretary-General for Administration and Management. On 1 December 1973, his functional title was changed to Administrative Management Officer and after serving on further fixed-term appointments, on 14 November 1974, he was offered a probationary appointment and on 1 May 1975, a permanent appointment. On 1 April 1976, the Applicant was promoted to the P-5 level and his functional title was changed to Senior Administrative Management Officer. On 30 April 1991, the Applicant separated from the service of the United Nations.

In 1989, the post of Chief, Management Advisory Service, at the D-1 level, became vacant in the Evaluation and Management Services Division, Office of Programme Planning, Budget and Finance of the Department of Administration and Management. Its vacancy was announced in Vacancy Announcement 89-A-OPB-347-NY. Staff members at the D-1 or P-5 level were invited to apply. The Applicant and sixteen other staff members applied for

the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment system established under Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date (and its addenda).

The system was designed to fill, through redeployment, essential posts that were vacant as a result of the recruitment freeze or projected to become vacant in the near future. These posts would be reviewed by departments and offices to determine which were essential to meet programme mandates. All vacancies to be filled would be advertised and qualified staff members would be invited to apply, including staff serving within the office where the vacancy was located. The candidates would be reviewed and evaluated by a Redeployment Committee, whose functions would initially be entrusted to the Appointment and Promotion Board (APB) at Headquarters for posts in the Professional category and above. The APB would recommend a short-list of staff members found to be the best qualified for each vacancy; and the short-list of candidates would be communicated to the heads of department or office concerned, who would then make the final selection. However, as the 1986 promotion review was under way, vacant posts already identified for staff members recommended for promotion would not be included in the review.

The Applicant's application, and those of sixteen other applicants, were forwarded to the APB. After considering all the applications, the APB submitted to the Office of Human Resources Management (OHRM), a short-list of three candidates which did not include the Applicant. One of the staff members listed in the short-list was Mr. Joseph Klee, whose D-1 post in OHRM had been abolished during the retrenchment exercise and who was encumbering a temporary non-core post. The APB decided that the three names should be transmitted to the Department of Administration and Management for final selection by the head of the Department. Such transmission was effected in a memorandum dated 22 November 1989, from the Assistant Secretary-General, OHRM, to the Acting Under-Secretary-General for Administration and Management.

In a reply dated 15 December 1989, the Acting Under-Secretary-General for Administration and Management informed the Assistant Secretary-General, OHRM, that he had selected Mr. Klee to fill the D-1 post of Chief, Management Advisory Service, which the Applicant had sought.

On 14 March 1990, the Applicant requested the Secretary-General to review the administrative decision not to appoint him to that post. On 18 May 1990, the Director, Staff Administration and Training Division, OHRM, informed the Applicant that the decision not to appoint him as Chief, Management Advisory Service, had been "properly taken in accordance with established procedures" and would not be rescinded.

On 1 June 1990, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 14 February 1991. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 31. Firstly, the Panel concludes that though the VMS seems to be at variance with staff rule 104.4, the Panel had no basis for concluding that the appellant would have been promoted against the contested D-1 post, if staff rule 104.14(f)(iii) had been adhered to.
>
> 32. Secondly, the Panel concludes that the appellant's right to full and fair consideration for the contested post was honoured.
>
> 33. Thirdly, the Panel concludes that the appellant suffered some moral damage as a result of his application having been considered under procedures which seem to be at variance with established procedure.
>
> 34. Accordingly, the Panel recommends that the appellant be awarded the sum of $1.00 as moral compensation.
>
> 35. The Panel makes no further recommendation in support of the appeal."

On 5 March 1991, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report and had decided to maintain the contested decision and to take no further action on the case. The letter read in part as follows:

> "... The Secretary-General fully agrees with the Board's conclusion that your right to full and fair consideration for the contested post was honoured. He cannot agree, however,

with its conclusion that you suffered moral damages as a result of your application having been considered 'under procedures which seem to be at variance with established procedure', and with its consequential recommendation for award of the sum of $1.00 as moral compensation. The Secretary-General promulgated the vacancy management system in Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 which, while it remains in effect, has suspended the application of the procedure provided for in staff rule 104.14(f)(iii)(a), a promotion review to be conducted normally once a year. The establishment of the vacancy management system constituted a valid exercise of the Secretary-General's authority as Chief Administrative Officer, and there was no ambiguity as to the procedures to be followed in the filling of the contested post which you accepted by availing yourself of the benefits of vacancy management system by applying for the post pursuant to these provisions."

On 4 June 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to fill the vacant D-1 post following the Vacancy Management and Staff Redeployment system procedure was invalid. If the Applicant's promotion had been considered under staff rule 104.14 only P-5 candidates with 10 years experience would have been considered and the Applicant would have been promoted.

2. The Respondent failed to observe the guidelines of the Vacancy Management and Staff Redeployment system and did not fairly and objectively review the qualifications and experience of the candidates, thus causing the Applicant damage.

3. The Joint Appeals Board in its report did not correctly address the issues raised by the Applicant.

Whereas the Respondent's principal contentions are:

1. Promulgation of a temporary Vacancy Management and Staff Redeployment system by means of a Secretary-General's Bulletin and subsidiary administrative instructions was a valid exercise of the Respondent's discretionary powers.

2. The Applicant's right to full and fair consideration for the vacant D-1 post promotion was observed under the Vacancy Management and Staff Redeployment system.

3. The Applicant applied for promotion under the Vacancy Management and Staff Redeployment system and was thus bound by its procedures which were properly applied.

The Tribunal, having deliberated from 5 June to 2 July 1992, now pronounces the following judgement:

I. In his first plea, the Applicant challenges the validity and applicability of the Vacancy Management and Staff Redeployment system (VMS). The Tribunal has already ruled on this issue in Judgement No. 537, Upadhya (1991) and held that the VMS was lawfully established and applicable to promotions that took place during the period in question. Accordingly, the Applicant's objections to the applicability of the VMS to the promotion process in which he was involved are dismissed.

II. The Applicant also contends that, even under VMS, the selection process was flawed, on the grounds that the criteria used for establishing the short-list from which the candidate was to be finally selected was not the one contemplated in paragraph 10 of ST/AI/338/Add.5, according to which the short-list should include "the best qualified for each vacancy". The Applicant submits that the short-list was drawn "not on the basis of qualifications as required by paragraph 10 of ST/AI/338/Add.5 but ... on the basis of whether the candidates' posts were scheduled to be abolished or not". As a result, according to the Applicant, the short-list included the names of three qualified staff members but not of the three most qualified staff members as required.

III. The Applicant further submits that although paragraph 13 of ST/AI/338/Add.5 provides that "other things being equal, priority should be given to staff members encumbering posts scheduled to be abolished", the Appointment and Promotion Board (APB) gave priority to staff members encumbering posts scheduled to be abolished, overlooking the fact that priority should be granted only if "other things" were equal.

IV. The Tribunal holds that there is no evidence to support the Applicant's claim that the short-list was drawn taking into account only candidates encumbering posts to be abolished. On the contrary, the Tribunal is of the view that the evidence shows that the merits of all the candidates were duly considered, that not all of the candidates short-listed were encumbering posts slated to be abolished, and that the result was a valid exercise of the APB's discretion. According to its jurisprudence, the Tribunal cannot substitute its opinion for that of the review body as far as the comparison of merits is concerned. It can only ascertain whether all the candidates were fairly reviewed. This being the case, the Tribunal finds that the short-list was drawn up in accordance with the guidelines set forth in ST/AI/338.

V. The Applicant also claims that the Administration could have side-stepped the selection process altogether and appointed Mr. Klee, the staff member finally selected for the post, through a lateral transfer since he served in the Department where the vacancy was located. This would have been possible under paragraph 3 of ST/AI/338 or under paragraph 4 of ST/AI/338/Add.3 since, as the Applicant argues in his submission to the JAB: "The former involves simply a reassignment of the candidates without any vacancy notification" and the latter admits lateral transfer "without any review of the qualifications of the candidate by the APB". The Applicant submits that, since the Administration did not choose to follow this procedure but, instead, set in motion the selection process, it should abide by the rules that govern such selection process and duly consider all the candidates that applied for the post, instead of simply transferring laterally the candidate selected.

VI. The Tribunal will not enter into this question, although it points out that paragraph 4 of ST/AI/338/Add.3 enables the Administration to omit review by the APB in the case of a lateral transfer. In the Tribunal's view, no evidence has been produced to demonstrate that the selection process was not properly conducted, or that the candidates were not properly reviewed and their merits not properly considered.

VII. The Tribunal has consistently held that with respect to promotion, staff members' rights are limited to being fairly considered. The final choice lies entirely within the properly exercised discretionary authority of the Respondent. The Tribunal has also consistently held that, apart from cases of prejudice or influence of extraneous factors, it cannot examine or compare the merits of different applicants for a post.

VIII. In the present case, the Tribunal finds that the evidence produced shows that the relevant procedures were duly followed, that the Applicant was fairly considered for promotion and that no prejudice, discrimination or extraneous factor has tainted the outcome of the selection exercise.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Ioan VOICU
Member

Geneva, 2 July 1992

R. Maria VICIEN-MILBURN
Executive Secretary